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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 302

BERNARD MORTIMER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ABE KRASH
ARTHUR E. STROUT
MURRAY H. BRING
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

ARNOLD, FORTAS & PORTER
Washington, D. C.

JOHN F. KELLY
TAYLOR & KELLY
Chicago, Illinois

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Bernard Mortimer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on March 23, 1965.

CITATIONS TO OPINIONS BELOW

The District Court did not render an opinion. Its judgment is reprinted in the Appendix, p. 2a, *infra*. (R. 249-50).[1] The opinion of the Court of Appeals is reported at 343 F.2d 500, and is reprinted in the Appendix, p. 4a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1965. (Appendix, p. 11a, *infra*). A timely petition for rehearing was filed on April 7, 1965, and it was denied on April 29, 1965. (Appendix, p. 12a, *infra*). On May 24, 1965, an order was entered by this Court extending the time within which to file a petition for certiorari to and including June 28, 1965. (Appendix, p. 13a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district judge may pass sentence in a felony case without obtaining a presentence investigation and report as provided for by Rule 32(c) of the Federal Rules of Criminal Procedure, or without indicating his reasons for ignoring the presentence aids made available by that Rule.

2. Whether, consistently with the guaranty of the Fifth Amendment that no person shall "be deprived of life, liberty, or property, without due process of law," a district judge may preclude a defendant in a criminal tax evasion case from demonstrating absence of criminal intent.

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[1] The record references are to the printed record prepared for the Court of Appeals. Petitioner has filed nine copies of this record with the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution; Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. § 7201; and Rule 32(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., Rule 32(c). These provisions are set forth in the Appendix, beginning at p. 1a, *infra*.

STATEMENT

Petitioner was indicted under Section 7201 of the Internal Revenue Code of 1954 for tax evasion. (R. 3-5). The indictment contained four counts, one count for each of the years 1957 through 1960. He was tried by the district judge (Hoffman, J.) without a jury and found guilty on each count, whereupon he was sentenced to a term of imprisonment of two years—six months on each of the four counts, the sentences to run consecutively—and he was fined $1,250 on each count, the fines to be cumulative. (R. 249-50).

Petitioner is a man sixty-three years of age. (R. 165). He is a respected physician and surgeon in Joliet, Illinois, where he has practiced as an obstetrician and gynecologist since 1943. (R. 161, 178-81, 213-14). In addition to his medical degrees, he possesses a Ph.D from the University of Chicago in chemistry, physics and mathematics. (R. 160-61). He is active in civic affairs and has been president of the Civic Music Association in Joliet. (R. 166). His wife is also a physician; she specializes in pediatrics and pediatric allergy. (R. 160).

When petitioner came to Joliet in 1943, he carried on the practice initially started by his predecessor, Dr. J. Campbell Carey. (R. 161). Dr. Carey main-

tained a system of record-keeping which petitioner continued to use during his years of practice in Joliet. (R. 161). That system entailed the use of a daily log and individual account cards. The log was designed to show, for each day, a list of the patients treated, the amount charged each patient, and the amount of all fees received. The patient account cards were in part a duplication of the daily log and reflected the charges made to and the amounts paid by each patient. (R. 14-16, 20-22, 169). The customary procedure employed by petitioner was to instruct his nurse to enter the receipt of all payments in the log on the day they arrived, and thereafter to transfer that information from the log to the patient account cards. (R. 169). In preparing his tax returns, petitioner assumed that the daily log accurately reflected the amounts received from his patients, and he therefore computed his gross income for each year by totaling the receipts shown in the log. (R. 167).

In 1961, a special agent of the Internal Revenue Service initiated an investigation of petitioner's tax returns for the years 1957 through 1960. This agent first visited petitioner in August, 1961, and, thereafter, he and another agent made frequent calls on petitioner. (R. 109). Petitioner was cooperative with these agents on all occasions and made available to them all records which were requested and which he could readily find. (R. 121). The agents examined petitioner's records and computed figures for gross income from the patient account cards. On the basis of their computations, they concluded that petitioner had substantially understated his income.

At the trial, Miss Mary Lou Shea, who was petitioner's nurse during the years in question, was called as a Government witness. (R. 13). She testified that

she was instructed to keep petitioner's records in the fashion described above, but that on occasion she would post payments directly on the patient cards without first posting them in the log. (R. 14-16, 20-23). During the course of cross-examination, petitioner's counsel asked the following question: "In all the years you worked for Dr. Mortimer, Miss Shea, did Dr. Mortimer ever so much as once ask you to post directly to the ledger cards or deliberately omit any kind of financial information?" (R. 20). The district judge sustained an objection to this question. (R. 20).

As part of its attempt to prove that petitioner knowingly evaded the income tax laws, the Government showed that he had used checks and cash paid to him by his patients to purchase money orders during the years in question. (R. 146-58).[2] The Government argued that, because petitioner did not deposit all of the fees he received from his patients in his personal checking account, but instead used part of that money to purchase money orders, the inference should be drawn that he was attempting to channel portions of his income away from the normal banking records which the Internal Revenue Service frequently utilizes in attempting to ascertain whether a taxpayer has understated his income. (R. 218).

In order to rebut this inference, petitioner's counsel tried to demonstrate that petitioner's purchase of money orders did not constitute an attempt to conceal his true income, because on one occasion he actually

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[2] These money orders were used for various purposes by the petitioner. He used money orders to purchase a Stradivarius violin at a cost of $20,000 which he presented anonymously to a concert violinist. (R. 199-200). On still other occasions, petitioner used money orders to make charitable contributions and to pay personal and business obligations. (R. 187-89, 197-98). Some of the checks used to purchase money orders were checks payable to petitioner's wife. (R. 150).

used a money order to pay his income tax. (R. 190-91). The district judge sustained an objection to this line of inquiry. (R. 191).

Immediately upon conclusion of the trial, the district judge found petitioner guilty on all counts. (R. 239-40). The judge then asked petitioner's counsel if he had anything to say before sentence was imposed. (R. 240). Petitioner's counsel asked that the matter of sentencing be deferred, but the judge refused this request, and merely ordered a brief recess so that petitioner and his counsel could confer. (R. 240-41). After the recess, which lasted only a few minutes, the district judge permitted petitioner's counsel to make a brief statement and invited petitioner to make a statement. (R. 241-42). The judge then immediately imposed the severe sentence described above. (R. 243). It should be noted that no more than a few minutes were consumed between the adjudication of guilt and the imposition of sentence, and that the district judge neither asked the probation officer for a presentence investigation and report, nor expressed any reason for ignoring these valuable aids which have been made available by Rule 32(c) of the Federal Rules of Criminal Procedure.

The Court of Appeals affirmed the conviction. It held that the district court did not err in limiting the cross-examination of Miss Shea, and that, even if the district court had committed error in refusing petitioner's counsel permission to demonstrate that petitioner had paid his income tax by use of a money order, that error was not prejudicial.[3]

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[3] Judge Castle, in a concurring opinion, said that he thought the district judge improperly limited the cross-examination of Miss Shea, but he did not believe that the error warranted reversal. (Appendix, p. 9a, *infra*).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question concerning the administration of criminal justice in the federal courts; namely, whether a district judge should pass sentence in a felony case without first obtaining a presentence investigation and report as provided for by Rule 32(c) of the Federal Rules of Criminal Procedure, or without at least indicating his reasons for failing to use these presentence aids. This question merits the Court's review not only because of its intrinsic importance to the proper dispensation of justice in federal criminal proceedings, but also because it has been resolved in a conflicting manner by at least two United States Circuit Courts of Appeals.[4] Compare *Peters* v. *United States*, 307 F.2d 193 (D.C. Cir. 1962), and *Leach* v. *United States*, 334 F.2d 945 (D.C. Cir. 1964), with *United States* v. *Karavias*, 170 F.2d 968 (7th Cir. 1948).

The adoption of the Rules of Criminal Procedure in 1946 was widely hailed as an important step forward in the administration of criminal justice. An important aspect of those Rules is the provision of Rule

[4] Petitioner recognizes that this question was not raised in the Court of Appeals, but nevertheless suggests that it is appropriate for review by this Court. All of the facts giving rise to the question are clearly set forth in the record. The issue raised involves solely a question of law and does not require an examination or appraisal of the evidence. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211 (1951). The failure to raise below a question concerning the administration of criminal justice in the federal courts is not a jurisdictional impediment to this Court's consideration of the question. *Pollard* v. *United States*, 352 U.S. 354 (1957). Accordingly, petitioner contends that the importance of the question, and the conflicting way in which it has been decided by different Courts of Appeals, warrant the exercise of this court's jurisdiction, even though the question was not raised below. See Rule 52 (b), Fed. R. Crim. P.

32(c) which directs the probation service to "make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs."[5] That provision is based upon a number of principles which have become cornerstones in modern criminal jurisprudence; namely, that the question of criminal liability is separate and distinct from the question of appropriate punishment; that there are significant differences between persons found guilty of the same criminal conduct, and that those differences should be reflected in the sentences which are imposed for such conduct; that modern concepts of sociology and psychology do have a place in the lexicon of criminal jurisprudence; and, above all, that society's interest is better served by a penal system which emphasizes rehabilitation as much as, if not more than, retribution. See *Williams* v. *New York,* 337 U.S. 241, 247-250 (1949). As one eminent judge has stated:

> "The traditional effort to make the punishment fit the crime is largely superseded by an effort to

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[5] The notes of the Advisory Committee on the Rules of Criminal Procedure indicate that the purpose of paragraph (c) of the Rule is "to encourage and broaden the use of presentence investigations," 18 U.S.C.A., Rule 32, Notes of Advisory Committee on Rules. One important change brought about by the new Rule is that the machinery for obtaining a presentence investigation is set in motion automatically and may be dispensed with only upon the express direction of the district court. This was not true under the statute which was superseded by the new Rule, 18 U.S.C. § 727. Under that statute, the probation officer was not required to undertake a presentence investigation unless directed to do so by the court. See *United States* v. *Karavias, supra,* at 972. This change clearly demonstrates that the draftsmen of the rule intended that district courts would use the presentence investigation as a routine matter.

make the treatment fit the offender." *Leach* v. *United States, supra,* at 950.

In short, Rule 32(c) affords the district judge the tools he needs to give proper consideration to the principles outlined above and to the individuality of the person whose life he may alter drastically. In *Williams* v. *New York, supra,* the Court quoted with approval the following statement of Judge Lewis B. Schwellenbach (337 U.S. at 249, n. 14):

> "The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. There is no substitute for information. *The sentencing judge in the federal court has the tools with which to acquire that information. Failure to make full use of those tools cannot be justified.*" [Emphasis supplied].

It is difficult to imagine many situations in which a district judge could not utilize, and could therefore properly dispense with, the presentencing aids afforded by the Rule. However, since a few such situations might arise, as for example when a specific sentence for a particular crime is made mandatory by law,[6] the drafters of the Rules saw fit to vest some discretion in the district judge to direct a waiver of the Rule's otherwise unlimited mandate to the probation service.[7] However, petitioner submits that, in the absence of extraordinary circumstances, it is an abuse of discretion and a subversion of the purpose of Rule 32(c) for a district

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[6] See, e.g., 18 U.S.C. § 1111 (the sentence for first degree murder is death, unless the jury directs otherwise, in which case, the judge must impose a sentence of life imprisonment); 18 U.S.C. § 1201 (the jury may prescribe the death penalty in a kidnapping case).

[7] See Federal Rules of Criminal Procedure, Second Preliminary Draft, Comment, p. 128 (1944).

judge to ignore the aids it provides. At the very least, a judge who chooses to follow this path should be required to state the reasons for his action so that a reviewing court will have a basis for determining whether he abused his discretion. Because sentences will normally not be disturbed on appeal in the federal courts, it is essential that the procedures relating to sentencing be meticulously observed.

It should be noted that the position urged by petitioner is not an extreme one. Indeed, the American Law Institute's Model Penal Code goes much further—it would eliminate any element of discretion on the part of the sentencing judge. It provides that:

> "The Court shall not impose sentence without first ordering a pre-sentence investigation of the defendant and according due consideration to a written report of such investigation where: (a) the defendant has been convicted of a felony; or (b) the defendant is less than twenty-two years of age and has been convicted of a crime; or (c) the defendant will be [placed on probation or] sentenced to imprisonment for an extended time." Model Penal Code § 7.07, Proposed Official Draft, 1962; pp. 117-118[8].

The draftsmen of the Code took pains to point out in their commentary that any rule short of the one proposed creates "an absolute inadequacy in the resources employed for the assistance of the court in sentencing." Model Penal Code, Proposed Official Draft, 1962, p.

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[8] "The brackets . . . were added to take account of the possibility that the requirement of an investigation prior to sentence of probation, rather than in the course of supervision, may be impractical in many jurisdictions and may thus have the undesired effect of discouraging probationary disposition." Model Penal Code § 7.07, comment, Proposed Official Draft, 1962, p. 119.

119[9]. This view has been reiterated by the vast majority of those who have devoted their energies and talents to an improved administration of criminal justice.[10]

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[9] Note should be taken of the full emphasis which the drafters placed upon the importance of the presentence investigation. Their commentary reads, in pertinent part, as follows:

> "In any system in which large discretion as to sentence has been vested in the court, it is obviously of the first importance that the court obtain accurate information on the many matters that are relevant to what the sentence ought to be. Even if the case was tried, the evidence may only give a partial picture of the circumstances of the crime .... In any case, the evidence is likely to give relatively little insight with respect to the history and character of the offender .... The use and full development of this device appears to us to offer greatest hope for the improvement of judicial sentencing.
>
> "The ideal course would be to require a presentence investigation in any case that comes before the court ....
>
> "... We think a system reasonably satisfactory that provides pre-sentence study when conviction is of felony, when the defendant is under 21, when the defendant will be placed upon probation or when he will be sentenced to imprisonment for an extended term. If this is unattainable we would sacrifice the inquiry in all felony cases in favor of all first convictions of a felony, retaining the investigation in the other categories. Where even this is unattainable, we think there is an absolute inadequacy in the resources employed for the assistance of the court in sentencing." Model Penal Code, Proposed Official Draft, 1962, p. 119, Tentative Draft No. 2, 1954, pp. 52-53.

[10] For example, see Administrative Office of U. S. Courts, Probation Division, *The Presentence Investigation* 1 (1965) ("Authorities in the judicial and correctional fields assert that a presentence investigation should be made in every case."); Youngdahl, *Remarks Opening the Sentencing Institute Program*, 35 F.R.D. 387, 388 (1964) ("Carefully prepared, verified presentence reports ... are indispensable adjuncts to objectivity and individualization in sentencing."); Glueck, *Pre-Sentence Examination of Offenders to Aid in Choosing a Method of Treatment*, 41 J.Crim.L.,C.&P.S.

The overriding importance of presentence investigations has been recognized by the Court of Appeals for the District of Columbia, which seems to have adopted the position urged by petitioner. In *Peters* v. *United States, supra,* the district judge sentenced the defendant immediately after an adjudication of guilt and without the benefit of a presentence investigation. The Court of Appeals set the sentence aside and remanded the case, holding that the district judge's failure to ask for such an investigation was reversible error. Subsequently, the same court, citing its earlier *Peters* decision, reversed a district judge's denial of defendant's request for a presentence mental examination, saying that "the sentencing judge should use some of the resources which Congress has provided and . . . may not arbitrarily ignore the data properly obtained thereby." *Leach* v. *United States, supra,* at 951.

The Court of Appeals for the Seventh Circuit, as is demonstrated by petitioner's case, has not required the same degree of compliance with either the spirit or the letter of Rule 32(c). Rather, it has affirmed several cases in which the district judge has neither obtained a probation service report of presentence investigation, nor stated the reasons for his failure to do so. See *United States* v. *Karavias, supra; United States* v. *Tenenbaum,* 327 F. 2d 210 (7th Cir.), *cert. denied,* 377

717, 730 (1951) ("In the modern administration of criminal justice, a pre-sentence report . . . is an indispensable basis for the sentencing and treatment processes . . . ."); Bennett, *Count-Down for Judicial Sentencing,* 28 J.B.A., D.C. 420, 426 (1961) ("Failure to make full use of these tools [presentence investigations] cannot be justified."); Rubin, *Sentencing Goals: Real and Ideal,* 21 Fed. Prob., June, 1957, pp. 51, 54 ("[T]he presence investigation is the best way we have to find and evaluate the multiplicy [sic] of factors in the individual case.").

U.S. 905 (1964); *United States* v. *Garfinkel*, 285 F. 2d 548 (7th Cir. 1960) *cert. denied*, 365 U.S. 879 (1961). Indeed, that court has not only refused to find an *abuse* of discretion in these cases, but it has also indulged in broad inferences to find an *exercise* of any discretion at all. Thus, when it was pointed out to the court in the *Karavias* case that the district judge had failed to direct the probation service not to make a presentence investigation and report, as the language of the rule requires, the Court of Appeals justified this omission by saying that when the district judge "proceeds to impose sentence following a trial and conviction, such action is tantamount to directing the probation service of the Court to desist from making an investigation prior to pronouncement of sentence." *United States* v. *Karavias, supra*, at 972.[11]

Petitioner contends that the position taken by the Court of Appeals for the District of Columbia is the correct one, for it gives full meaning to the purposes and objectives of Rule 32(c). Its advantages are readily apparent when viewed in the context of this case. Petitioner is an educated professional man and a respected citizen of his community. He has been active in civic and philanthropic affairs. Both he and his wife are at an advanced age and suffer from a number of physical ailments. Yet, without indicating he was considering these facts in the context of sentencing, without the benefit of a presentence investigation

[11] In addition to the Court of Appeals for the Seventh Circuit, other Courts of Appeals have demonstrated a casual attitude toward compliance with the provisions of Rule 32(c). See *Roddy* v. *United States*, 296 F. 2d 9 (10th Cir. 1961); *United States* v. *Williams*, 254 F. 2d 253 (3d Cir. 1958); *United States* v. *Schwenke*, 221 F. 2d 356 (2d Cir. 1955); *Tarkington* v. *United States*, 194 F. 2d 63 (4th Cir. 1952).

and report, without indicating a single reason for failing to take advantage of these aids, and without meditating for more than a very few minutes subsequent to the adjudication of guilt, the district judge saw fit to impose a severe criminal penalty upon petitioner.[12] One cannot say as a matter of certainty whether the district judge would have imposed a different sentence had he taken advantage of the procedures outlined by Rule 32(c). However, there can be no doubt that he would have obtained a much better understanding of petitioner and his circumstances, and based upon that understanding, might very well have decided to follow one of several alternatives that are open to a federal judge in imposing sentence.[13]

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[12] The severity of sentences imposed in tax cases, and the disparity between sentences imposed in such cases have been frequent bases for criticism. See Youngdahl, *Remarks Opening the Sentencing Institute Program*, 35 F.R.D. 387, 390 (1964); Boldt, *Sentencing the Income Tax Violator, Statement of the Basic Problems*, 26 F.R.D. 264, 265 (1961); Campbell, *Sentencing the Income Tax Violator, Scope of the Session*, 26 F.R.D. 264 (1961). At least one commentator has recognized that disparities in sentencing are, in part, due to the failure of some courts to use the presentencing tools that are available to them. Goodman, *Utilization of Presentence Resources*, 26 F.R.D. 323 (1961). To be sure, disparities which are based upon a full recognition of the individual circumstances in each case are legitimate and laudible. However, disparities which result from a failure to consider the peculiarities of each situation, as was certainly true in this case, and would be true in any case where the judge failed to obtain a presentence investigation report, can only be regarded as judicial irresponsibility.

[13] For example, the judge could have imposed a suspended sentence; he could place the petitioner on probation; he could have imposed a split sentence, 18 U.S.C. § 3651; he could have sentenced petitioner and then referred him to the Prison Bureau to conduct any mental examinations which the presentence investigation and report may have shown were warranted, 18 U.S.C. § 4208(b), reserving until completion of those examinations a determination

It is petitioner's belief that unless this Court stamps its imprimatur on the vital importance of presentence investigations and uses its supervisory authority over the federal courts to require district judges to make greater use of the presentence aids provided for by Rule 32(c), or at least to state their reasons for failing to do so, the trend toward ignoring the Rule will probably be accelerated, and the salutary purposes of the Rule will be frustrated. Cf. *Green* v. *United States*, 365 U.S. 301 (1961).

2. The district court's failure to permit petitioner's counsel to demonstrate lack of criminal intent constituted prejudicial error and deprived petitioner of his liberty without due process of law in violation of the Fifth Amendment.

Both the statute under which petitioner was convicted, and the decisions of this Court, indicate that an essential element of the Government's burden of proof is demonstration of an affirmative act indicating criminal intent. 26 U.S.C. § 7201; *Holland* v. *United States*, 348 U.S. 121 (1954); *Spies* v. *United States*, 317 U.S. 492 (1943). Indeed, were it otherwise, any conviction under the statute would probably constitute a violation of the Fifth Amendment. See *Morissette* v. *United States*, 342 U.S. 246 (1952).

In this case, the affirmative acts which the Government attempted to prove in an effort to demonstrate

as to whether the sentence should be reduced under Rule 35 of the Federal Rules of Criminal Procedure; or he could have imposed sentence and fixed an earlier than normal date when petitioner might become eligible for parole, 18 U.S.C. ¶ 4208(a). Obviously, a proper selection from among those various alternatives requires as much knowledge as is available concerning the defendant upon whom sentence is to be imposed.

criminal intent were (i) failure of petitioner to record all of his income on the daily log from which his tax returns were computed, and (ii) the use of fees paid by petitioner's patients to purchase money orders.

In spite of the fact that proof of these points was crucial to the Government's case, the district judge precluded petitioner's counsel from eliciting testimony which would rebut the Government's evidence and negate the inferences which the Government asked the judge to draw. Thus, the court prevented petitioner's counsel from asking Miss Shea whether she had ever been directed by petitioner to post fees received directly to the patient cards or deliberately to omit any kind of financial information. The vital importance of this question is readily apparent. The Government claimed that petitioner knowingly understated his income for the years in question. Petitioner, on the other hand, asserted that such was not the case. He claimed that any error which occurred resulted from his erroneous belief that Miss Shea had entered all fees received in the daily log, that the log therefore contained an accurate reflection of his yearly income, and that it could therefore be used as a basis for computing his income tax. Accordingly, the manner in which Miss Shea kept petitioner's records, and his understanding thereof, were crucial to the Government's demonstration of criminal intent. In this context, it cannot seriously be argued that the district judge merely committed harmless error in prohibiting petitioner's counsel from asking Miss Shea whether petitioner had ever instructed her to post payments received directly to the patient cards, instead of first posting them in the daily log; or whether petitioner had ever directed her to omit any kind of financial information from his records.

Similarly, the district court committed prejudicial error in preventing petitioner from showing that on one occasion he had used a money order to pay his income tax. This evidence would have cast serious doubt on the Government's claim that petitioner used such money orders as a means of avoiding normal banking records and of concealing his true income, for, certainly, no one who was purchasing money orders for that purpose would be so stupid as to send one to the Internal Revenue Service.

The errors committed by the district judge were manifestly prejudicial. They deprived petitioner of the opportunity to demonstrate an absence of criminal intent, and they therefore led to a deprivation of his liberty without due process of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABE KRASH
ARTHUR E. STROUT
MURRAY H. BRING
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

ARNOLD, FORTAS & PORTER
Washington, D. C.

JOHN F. KELLY
TAYLOR & KELLY
Chicago, Illinois

June, 1965

APPENDIX

Constitutional and Statutory Provisions

1. The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 7201 of the Internal Revenue Code of 1954 provides (26 U.S.C. § 7201):

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

3. Rule 32(c) of the Federal Rules of Criminal Procedure provides (18 U.S.C.A., Rule 32(c)):

> (c) PRESENTENCE INVESTIGATION
>
> (1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court

or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

Judgment of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 63 CR 711

THE UNITED STATES OF AMERICA, *Plaintiff*

v.

BERNARD MORTIMER, *Defendant*

On this 30th day of March, 1964 came the attorney for the government, and the defendant appeared in person and[1] by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and finding of guilty of the offense of attempting to evade a large part of income tax due and filing fraudulent income tax returns in violation of Section 7201, Internal Revenue Code of 1954.

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

as charged[3] in Counts 1, 2, 3 and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Six (6) Months on each of Counts 1, 2, 3 and 4 of the indictment, said sentences to run consecutively.

It Is Further Order that the defendant forfeit and pay to the United States of America a fine in the sum of One Thousand Two Hundred Fifty Dollars ($1,250.00) on each of Counts 1, 2, 3 and 4, said fines to be cumulative, or a total fine in the sum of Five Thousand Dollars ($5,000.00) and costs of prosecution, defendant stand committed until fine and costs are paid.

It is Adjudged that[5] [stricken out]

It Is Further Ordered that defendant be enlarged on bail pending appeal in the sum of $5,000.00, and defendant given until April 6, 1964 to post said bond, with surety. Defendant's present bond of $1,000.00 to stand in full force and effect until April 6, 1964.

---

[3] Insert "in count(s) number " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JULIUS J. HOFFMAN,
United States District Judge

The Court recommends commitment to:[6]

March 30, 1964

....., *Clerk*

[6] For use of Court wishing to recommend a particular institution.

Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14706 September Term, 1964 January Session, 1965

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

BERNARD MORTIMER, *Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

March 23, 1965

Before SCHNACKENBERG and CASTLE, *Circuit Judges* and MERCER, *District Judge.*

SCHNACKENBERG, *Circuit Judge.* Bernard Mortimer, defendant, has appealed from a judgment of the district court finding him guilty on a four-count indictment, charging him with willfully and knowingly attempting to evade a large part of income tax due and owing by him and his wife to the United States of America for the years 1957 to 1960 inclusive, under which judgment he was committed for

imprisonment for a period of six months on each count, the sentences to run consecutively, and he was fined $1250 on each of said counts, cumulatively, and costs.

There was evidence tending to prove the facts which we now state.

Defendant is a physician and surgeon, who, during the taxable years, practiced from an office in Joliet, Illinois. His office work was done by Miss Shea, a nurse. Defendant showed her his records, which consisted of a daily log book and patients' account cards, referred to in the record also as ledger cards. The log book was designed to show for each day a list of the patients, the amount charged each patient, and the amount paid by each patient on that day. The purpose of a patient's account card was to show the charges due and and the amounts paid by each patient, posted from the log book. Miss Shea kept these records during the years involved. The defendant instructed her to enter all receipts in the daily log book and to post from the daily log book to the patients' account cards.

Defendant testified that the receipts in the log book were totaled and he used the amounts so determined as the receipts from his practice as shown on his income tax returns. He further testified that he made a rough computation based on the number of deliveries he made since that was the primary source of his fees.

With defendant's consent, revenue agents Smith and Chau examined the log book for 1958. He was not able to find the log books for the other years. The agents were also shown a drawer containing patients' account cards. Defendant instructed his nurse to make the records available to the agents. They were unable to find account cards for some of the names written in the log book. They also noted that there were account cards on which they were entries of payments during the year 1958 that did not appear in the log book. Moreover, there was evidence showing defendant's course of conduct which resulted in

some payments of $100 or over being omitted from the 1958 log book.

Smith prepared lists of names of patients for whom he had not observed account cards and gave them to the defendant or his nurse. Additional account cards were given to the agents as the doctor or his nurse found them. Smith testified that defendant told him that he never got around to systematically destroying old cards, that all cards that he had were in the file, that there were no other records anywhere, and that those that were not in the file were destroyed as obsolete or were lost.

There was evidence that on March 27, 1962, Mrs. Lega, who had replaced Miss Shea, stated to Smith that she had found some cards in a file cabinet in the closet. This "bundle of cards" she gave to Smith and on March 30, 1962, when he telephoned defendant, he was told that defendant had found more cards, 309 of which cards defendant gave to Smith by April 12, 1962.

On May 3, 1962, Smith told defendant that he had found many cards since defendant showed the agents "this supposedly inactive file" and defendant said "What do you mean, supposedly inactive file?" Defendant stated he had given the agents all the cards he had and that he had no other file. On May 11, 1962, defendant told Smith that he had not found any more cards in his office. Smith then told defendant he "had found 862 cards in his hidden file" and defendant told Smith he resented the agent's implication that he was dishonest.

On May 14, 1962, Smith called defendant and asked if he had found the cards which Smith had asked about. Defendant said he had some cards and that Smith could come in and observe them. Smith went to defendant's office and found 42 cards on defendant's desk, 33 of which had entries on them for the years 1957 through 1960. Smith testified that these were the last cards he received from defendant's office.

The agents during their examination transcribed payments from 1590 patients' account cards to individual sheets for each patient. These transcriptions were separated into two groups, first, account cards obtained from the file drawer in defendant's private office, and cards given to him by defendant or his nurse from lists prepared by Smith, during the period from September 5, 1961 to March 30, 1962, and, second transcriptions of account cards given to Smith after March 30, 1962.

The total amounts derived as patients receipts by the agents from their examination of defendant's account cards, as compared with the receipts reported on defendant's income tax returns for the years involved, and the differences for each year are as follows:

Year	Receipts Per Account Cards	Receipts Per Returns	Difference
1957	$45,630.17	$30,875.00	$14,755.17
1958	44,305.90	29,616.00	14,689.90
1959	46,261.25	27,773.00	18,488.25
1960	43,778.10	29,046.99	14,731.11[1]

Defendant had a checking account for his practice in the Union National Bank and Trust Company of Joliet and a personal checking account at the First National Bank of Joliet. Defendant testified that the deposits made in the checking account for his practice were to cover his office expenses.

Defendant purchased money orders at the Union National Bank and Trust Company in the following aggregate amounts:

1957	$24,037.80
1958	62,487.29
1959	28,976.57
1960	36,763.18

[1] These figures are quoted from defendant's brief and have not been questioned by the government.

The bank is located in the same building as is defendant's office. Defendant testified that for the purchase of money orders he used checks and cash received by him from his patients, checks and cash received by his wife from her patients, and cash that he and his wife had accumulated in prior years. He also used a check in the amount of $4,856.63, which he received from an insurance company for storm damage, to purchase a money order. The money orders were used to pay personal obligations, to make charitable contributions, to purchase securities, and to purchase a Stradivarius violin at a cost of $20,000 which defendant presented anonymously to a concert violinist for his use.

A substantial number of checks issued to defendant by his patients were negotiated at the draft cage of the Union National Bank and Trust Company and were not deposited by defendant. At that cage, money orders, cashier's checks and the like were issued.

Defendant argues in this court that, while the records evidenced the understatement of income for the years involved, the record in this case fails to show any evidence that the defendant knew, or any evidence upon which it could be inferred defendant knew, tha his nurse had not faithfully followed his instructions. Thus, defendant contends that there has been a failure of proof shown beyond a reasonable doubt of willfulness and specific intent on the part of defendant to commit the offense charged against him in the indictment.

However, we hold, that the evidence viewed in the light most favorable to the government, supports the conviction of defendant. The evidence pertaining to the various records in defendant's office, to which we have alluded at some length, and the attitude and statements of defendant when the investigating agents were attempting to ascertain the facts pertaining to his tax liability, when considered against his consistent pattern of substantially understating his income by approximately 40% over a period of four

years, are sufficient conduct on the part of defendant to demonstrate his consciousness of guilt and constitute proof of willfulness.

Defendant contends that, under the circumstances of this case, defendant's course of conduct in purchasing bank money orders lacks probative value sufficient to carry the government's burden to prove willfulness beyond a reasonable doubt. With this we do not agree.

We find that the district court did not erroneously restrict the cross-examination of Miss Shea when called as a government witness.

Finally, as reversible error, defendant points to the refusal to admit in evidence a money order payable to the Internal Revenue Service on account of defendant's 1960 tax or as a payment on his 1961 declaration. While it is not entirely clear that the district court did not err in this respect, it must be remembered that the trial was by the court, without a jury, and that there is abundant other evidence in the record to support the finding and judgment below. Hence, if a mistake was made in this respect, it was not prejudicial to defendant.

For these reasons the judgment from which this appeal has been taken is affirmed.

JUDGMENT AFFIRMED.

CASTLE, *Circuit Judge,* concurring. Miss Shea, testifying as a government witness, stated that she was employed by the defendant from April 1954 until December 1961, and that among her duties was bookkeeping. She identified the types of records she kept, including the daily log book and the account cards, and described the office procedure, including her receipt of the payments by the patients in person or through the mail, and her entries in the records. On cross-examination she was asked: "In

all the years you worked for Dr. Mortimer, Miss Shea, did Dr. Mortimer ever so much as once ask you to post directly to the ledger cards or deliberately omit any kind of financial information?" The court sustained the government's objection and ruled the question was not within the scope of the direct examination.

The subject matter of the office nurse's direct examination concerned office procedure, the posting of payments received from patients, and instructions given her by the defendant. The question asked was well within that subject matter. The court improperly refused to permit the witness to answer. But, as Judge Schnackenberg points out, the trial was to the court and there is abundant evidence to support the court's finding and judgment. On the facts and circumstances presented by this record the error neither requires or warrants a reversal.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Tuesday, March 23, 1965

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*
HON. FREDERICK O. MERCER, *District Judge*

No. 14706

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

BERNARD MORTIMER, *Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Thursday, April 29, 1965

Before

HON. LATHAM CASTLE, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. FREDERICK O. MERCER, *District Judge*

No. 14706

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

BERNARD MORTIMER, *Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by appellant, be, and the same is hereby DENIED.

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

BERNARD MORTIMER, *Petitioner*,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including June 28, 1965.

/s/ TOM C. CLARK

Associate Justice of the Supreme Court of the United States

Dated this 24th
day of May, 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 302

BERNARD MORTIMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 343 F. 2d 500 (Pet. 4a–10a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1965 (Pet. 11a). Petition for rehearing was denied by the court on April 29, 1965 (Pet. 12a). Mr. Justice Clark extended the time for filing a writ of certiorari to June 28, 1965 (Pet. 13a). The petition for a writ of certiorari was filed on June 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, it was plain error for the district judge to pass sentence without referring the case to the probation service for a pre-sentence investigation.

2. Whether the court's ruling confining cross examination of a government witness to subject matter within the scope of the direct examination was prejudicial error.

3. Whether the court committed prejudicial error in excluding cumulative documentary evidence that in April 1961 petitioner purchased a bank money order to pay federal income taxes.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> (26 U.S.C. 7201.)

Federal Rules of Criminal Procedure:

> Rule 32. *Sentence and Judgment*
>
> * * * * *
>
> (c) *Presentence Investigation*
>
> (1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation

unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

* * * * *

STATEMENT

Petitioner waived a jury and after a five-day trial was found guilty by the United States District Court for the Northern District of Illinois on each of four counts charging tax evasion for the years 1957 through 1960 (R. 1).[1] The court imposed consecutive sentences of six months and fines of $1,250 on each of the four counts (R. 243).

Petitioner is a doctor practicing as an obstetrician and gynecologist in Joliet, Illinois (Pet. 5a). He testified that he told his nurse to enter fees received in a "daily log book" and then to post them to the patient's individual account card (R. 14, 34, 168). Petitioner testified that in filing his income tax returns he reported the amounts shown in the daily log book (Pet. 5a, R. 167). The Internal Revenue agents'

[1] "R." references are to the petitioner's appendix in the court of appeals.

investigation showed (and the court below found) that throughout the 4 years here in question the revenues recorded on the individual account cards exceeded those shown in the daily log book and reported on petitioner's tax return by about 40% (Pet. 7a):

	Receipts per Account Cards	Receipts per Tax Returns	Difference
1957	$45,630	$30,875	$14,755
1958	44,205	29,516	14,689
1959	46,261	27,773	18,488
1960	43,778	29,046	14,731

Between August 31, 1961, and May 14, 1962, two investigating agents analyzed records made available to them at petitioner's office (R. 30–31, 72–73). The year 1958 was the only full year for which the daily log book was produced for examination; it was also produced for the last half of 1960 (R. 95–96). Petitioner stated that no other log books could be found (R. 46).

At the beginning of the examination petitioner told the agents he had one small file of patient's ledger cards and he permitted them to examine it (R. 34). Comparison of the 1958 log book and this card file showed discrepancies (R. 35–37) which petitioner said must have been accidental (R. 37). Thereafter the agents gave petitioner or his nurse lists of additional patients whose cards they wished to examine. Petitioner said on several occasions that there was no other file of cards and that many cards had been destroyed because they were obsolete (R. 34, 43, 50, 59, 71). After the agents advised him that they might

have to contact the patients, however, additional cards were either furnished by petitioner from time to time (R. 36, 47, 49, 55, 56, 72), or found inserted in the file previously furnished (R. 46). By March 30, 1962, a total of 682 cards had been made available (R. 50). On that date petitioner stated that he had found a file which was "inactive" in that there had been neither recent payments nor office activity (R. 56); by April 12, 1962, he had produced 309 more cards and, on April 17, 1962, he allowed the agents to go through this new file (R. 56–57). The agent again insisted that there were still more cards. Although petitioner denied this (R. 59, 71), he later produced 42 cards, 33 of which contained entries between 1957 and 1960 (R. 73, 93–95).[2]

Petitioner testified that he deposited just enough cash to cover his checks for office expenses (R. 212), and used his remaining cash and checks, plus cash and checks received by his wife, plus cash that he and his wife had accumulated in prior years, to purchase bank money orders totalling more than $150,000 during the four prosecution years (Pet. 7a–8a; R. 245–249).

ARGUMENT

1. There is no merit in the argument (Pet. 7–15) that the trial judge erred in imposing sentence without first obtaining a presentence investigation and report. The point was not raised in either of the courts below and petitioner has made no showing that his case is "exceptional" or that the alleged error was

[2] Of the 905 cards which petitioner produced after March 30, 1962, 63 contained fees of $100 or more, compared to 16 such fees in the cards examined before March 30, 1962 (R. 93–95).

"plain". Cf. *Lawn* v. *United States*, 355 U.S. 339, 362, fn. 16. In fact, petitioner made no motion whatever for a presentence investigation and indeed invited the immediate imposition of sentence by addressing the court briefly (by his counsel and then by himself) on the question of mitigation of sentence (R. 241–242). Moreover, there is nothing in Rule 32 which forbids a judge from imposing sentence without first obtaining a pre-sentence investigation. In the instant case the sentencing judge had presided at petitioner's five-day trial where petitioner had testified at length in his own behalf and petitioner's personal and professional background were elaborated by character witnesses (R. 179–181, 213–214) and otherwise. The circumstances of the offenses were fully developed. There was no necessity to evaluate petitioner's role in the context of accomplices or co-defendants or to collect prior juvenile or criminal records. There was no need to consider related pending criminal charges or the possibility that petitioner might be mentally ill. The condition of petitioner's physical health was known to the court, and the prison terms imposed were only one-tenth of the maximum which could have been imposed.

There is no substance to the contention that two cases in the District of Columbia Circuit conflict with the present case (Pet. 7, 12). In *Peters* v. *United States*, 307 F. 2d 193 (C.A.D.C.), the court imposed maximum five-to-fifteen year sentences on 19 and 21 year old defendants immediately after verdict, without giving the defense so much as a chance to argue in mitigation of sentence. And *Leach* v. *United States*, 334 F. 2d 945 (C.A.D.C.), has nothing to do

with Rule 32; in that case the sentence was set aside on the ground that the trial court's refusal—in the face of persistent demands by the defense—to order a pre-sentence mental examination constituted an abuse of discretion because there were many indications of mental illness. Where, as here, there is no abuse of discretion, the non-use of a pre-sentence investigation is no ground for reversal, and this would be so even though the defendant had made a proper motion in the trial court and preserved his objection on appeal. *United States* v. *Karavias,* 170 F. 2d 968 (C.A. 7); *United States* v. *Schwenke,* 221 F. 2d 356 (C.A. 2); *United States* v. *Williams,* 254 F. 2d 253 (C.A. 3); *Roddy* v. *United States,* 296 F. 2d 9 (C.A. 10).

2. Also without substance is the contention (Pet. 15–16) that petitioner was unduly restricted in his cross-examination of Miss Shea, petitioner's office nurse during the prosecution years. On direct examination as a government witness (R. 12–16) she described her record keeping and other duties. In part she said that occasionally she would post payments directly from the patient's check to the ledger card although the normal procedure was to post from the logbook. She also stated she had destroyed records when instructed by petitioner. (R. 16.) On cross-examination, she was asked this question by defense counsel (R. 20):

> Q. * * * In all the years you worked for Dr. Mortimer, Miss Shea, did Dr. Mortimer ever so much as once ask you to post directly to the

ledger cards or deliberately omit any kind of financial information?

Mr. JOYCE: Objection, your Honor.

The COURT: Sustain the objection.

Mr. SOKOL: If the Court please, this is legitimate cross examination.

The COURT: Oh, I have been here; I have listened. I don't think that is within the scope of the direct examination, Mr. Sokol. There is no testimony on direct that the defendant ever directed this witness to do anything irregular.

The double framing of the question and its argumentative tenor undoubtedly colored the trial court's view of its meaning. The judge was certainly correct that the witness' direct testimony in no way accused petitioner of giving her irregular instructions. Moreover, petitioner was not deprived of the substance of this point. During subsequent cross examination of Miss Shea the court permitted defense counsel to show that the only reason she occasionally by-passed the log book in posting to the cards was by reason of being busy (R. 23), and then petitioner testified without objection that he did not instruct Miss Shea to omit anything from any of the office records (R. 193). Petitioner thereafter made no attempt to recall Miss Shea as a defense witness on this point.

3. Defense Exhibit 5 was excluded from introduction into evidence (R. 190–191). It was a $2100 bank money order purchased by petitioner on April 14, 1961, and payable to the Internal Revenue Service. Defense counsel offered this exhibit "for the purpose of showing intent" and on the issue of concealment without articulating the reasons now stated in his

petition. (Pet. 6, 17.) The government objected that the document was outside the prosecution years. Collateral issues attendant on admitting such evidence are easily foreseen, and the government had introduced no money orders outside prosecution years. Moreover, petitioner made the same point to better effect in his own testimony that he paid income taxes with bank drafts (R. 189); thus the physical document was merely cumulative.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.
Acting Assistant Attorney General.
RICHARD B. BUHRMAN,
JOHN P. BURKE,
Attorneys.

JULY, 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
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AUG 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 302

BERNARD MORTIMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF FOR PETITIONER

ABE KRASH
ARTHUR E. STROUT
MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

ARNOLD, FORTAS & PORTER
Washington, D. C.

JOHN F. KELLY
TAYLOR & KELLY
Chicago, Illinois

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 302

BERNARD MORTIMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF FOR PETITIONER

Petitioner submits this Reply Brief in order to clarify two misconceptions in the Government's Brief in Opposition:

1. On page 6 of its Brief, the Government asserts that, following conviction, petitioner "invited the immediate imposition of sentence". The record shows, to the contrary, that the trial judge proceeded with sentencing immediately following the adjudication of

guilt, despite a request by petitioner's counsel that sentencing be deferred (R. 240-41):

"[The Court]: There will be a judgment of conviction in respect to each count.

I will hear from you, Mr. Sokol.

Mr. Sokol [Petitioner's Counsel]: If the Court please, could we defer this? I am a little spent.

The Court: Defer what?

Mr. Sokol: If the Court please, I have no motions to make at this time. The only motion—I presume this is what the Court is asking?

The Court: What is the government's position? You mean you want to go until tomorrow morning to consider what you want to say to me tomorrow morning and what your client may want to say to me?

Mr. Sokol: I would be perhaps better prepared to respond to your Honor if I understood what—I don't quite understand what your Honor is asking me?

The Court: Your client has been convicted.

Mr. Sokol: Yes.

The Court: What do you ordinarily say after the judge has entered a judgment of conviction? What do you say? I am not trying to put words in your mouth. I am giving you an opportunity to be heard.

Mr. Sokol: If it is a matter of discussing mitigation, if the Court please, then—

The Court: You say anything you like to say. I am going to give you an opportunity to be heard after a judgment of conviction. We do it in every criminal case. We are obligated under the law to do it and we are obligated to hear the defendant under the Constitution.

Mr. Sokol: I would like to confer. I would like to have a few minutes to confer with the defendant before I respond.

The Court: All right.

We will recess for a few minutes.

(Brief recess)"

This colloquy clearly demonstrates that the trial judge was determined to impose sentence immediately, and that he would not even put the sentencing over for a day so that petitioner's counsel, who was "spent" after an exhausting trial, might have time to collect his thoughts and consider what motions he wished to make.

2. The Government contends (p. 6 of its Brief) that because the judge "had presided at petitioner's five-day trial", listened to petitioner's testimony in his own behalf, and heard the testimony of character witnesses, and because "the circumstances of the offenses were fully developed" at the trial, there was no need for a pre-sentence report in this case.

Petitioner suggests that the Government's argument not only misconceives the nature and purpose of the pre-sentence report, but also credits the trial judge with a degree of clairvoyance that the drafters of the Federal Rules of Criminal Procedure refused to recognize.

While it may be true, as the Government suggests, that "the circumstances of the offenses were fully developed" at the trial, it is certainly *not* true that the circumstances relevant to the imposition of sentence were fully developed at the trial. All of the testimony at the trial was, as is proper, directed to one issue—whether petitioner committed the crime with which he was charged. There was no medical testimony with respect to petitioner's health or his mental condition. Nor was any evidence introduced relating to petitioner's home life and the impact that a jail sentence might have on his ailing wife. Indeed, as the following excerpt from petitioner's examination of Special Agent

Smith reflects, the trial judge considered any testimony relating to the health of petitioner's wife as irrelevant and precluded its introduction into evidence (R. 122):

> "Q. Do you recall, sir, how many times you inquired about Dr. Edna's [petitioner's wife] health and how many times you conversed with Dr. Bernard Mortimer about Dr. Edna's health?
>
> Mr. Crowley: I will object to this, your Honor. This is irrelevant.
>
> The Court: I will sustain the objection. Please don't waste my time, Mr. Sokol. If the man was polite and wanted to know about a taxpayer's wife, that establishes him as a very gentlemanly officer of the United States, but it has nothing to do with the issues in this case. If she was sick, she evidently recovered, because she has been very diligently engaged in taking notes all through this trial."

Contrary to the impression conveyed by the Government's Brief, any bits of information pertinent to sentencing which may have been testified to could not have given an accurate background for sentencing purposes. Indeed, the draftsmen of the Model Penal Code have vigorously rejected the Government's suggestion that evidence introduced during the course of trial is an adequate substitute for a pre-sentence report:

> "In any system in which large discretion as to sentence has been vested in the court, it is obviously of the first importance that the court obtain accurate information on the many matters that are relevant to what the sentence ought to be. Even if the case was tried, the evidence may only give a partial picture of the circumstances of the crime . . . . In any case, the evidence is likely to give relatively little insight with respect to the history and character of the offender . . . . The use and full development of this device appears to us to

offer greatest hope for the improvement of judicial sentencing." Model Penal Code, Proposed Official Draft, 1962, p. 119, Tentative Draft No. 2, 1954, pp. 52-53.

Petitioner believes that the other points raised in the Government's Brief are adequately covered by the Petition.

Respectfully submitted,

ABE KRASH
ARTHUR E. STROUT,
MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

ARNOLD, FORTAS & PORTER
Washington, D. C.

JOHN F. KELLY
TAYLOR & KELLY
Chicago, Illinois

August, 1965

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